

No. 83-615

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In the Supreme Court of the United States

October Term, 1983

SYLVESTER MARK, Individually, and as a shareholder
of Centran Corporation, on behalf of Centran Corporation
and all others similarly situated,
Petitioner,

VS.

CENTRAN CORPORATION, et al.,
Respondents.

JOINT BRIEF OF ALL RESPONDENTS IN OPPOSITION

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**JOINT BRIEF OF ALL RESPONDENTS
IN OPPOSITION**

COUNTERSTATEMENT OF THE CASE

This is a private cause of action in which the Petitioner demanded that the directors and officers of Central National Bank of Cleveland pay damages directly to the class of shareholders of the Bank's parent holding company, Centran Corporation, or to the Bank itself for the derivative benefit of the holding company. The facts are accurately summarized in the District Court's opinion.

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In essence, the Bank purchased long term U. S. Treasury Bonds for its own account with funds produced by rolling over short term liabilities. These consisted of both Sale and Repurchase Agreements (Repo's) backed by the Bank's own securities, and Federal Funds Purchased (Fed Funds) backed by the Bank's own Federal Reserve deposits.

A sudden surge in short term interest rates caused the carrying cost of the Repo and Fed Fund liabilities to exceed the yield on the Treasury bonds, and the Bank suffered substantial losses.

The chief thrust of Petitioner's case is that the directors and officers violated the "Rule of Prudence," C.F.R. §1.4, a Regulation of the Comptroller of the Currency which allows national banking associations to buy Treasury bonds for their own accounts without restriction, but "subject to the exercise of prudent banking judgment." The District Court ruled that Title 12 U.S.C. §93(b), creating a civil penalty for violation of banking Regulations, gives exclusive jurisdiction to the Comptroller to determine and impose or remit the amount of the penalty.

Petitioner also asserted a private right of action for individual damages under Title 12 U.S.C. §93(a), which is authorized when directors violate express provisions of Chapter 2, including 12 U.S.C. §82. The Comptroller has ruled for many years that Sale and Repurchase Agreements and overnight Federal Fund Purchases are not "borrowings" in either form or legal effect, and are not restricted by the borrowing limitations of Title 12 U.S.C. §82. Further, Congress itself repealed 12 U.S.C. §82 in 1982 to remove all statutory borrowing limits, leaving all restrictions within the exclusive jurisdiction of the Comptroller's office. The District Court ruled that no violation of 12 U.S.C. §82, or any other provision of Chapter 2, existed to support a private action under 12 U.S.C. §93(a).

BRIEF IN OPPOSITION

There may well be some interest in the issue whether Title 12 U.S.C. §93(b) permits private enforcement in addition to the civil penalty administered by the Comp-

troller. This is a relatively new statute, enacted in 1978, and no Circuit Court has yet determined whether Congress intended to grant or to withhold the private remedy. There is no such imperative public importance as to require the immediate settlement of that issue.

Petitioner perceives an impending crisis in the national banking system unless this Court compels Congress to re-enact statutes imposing borrowing limits, and in addition compels the Comptroller to redefine the definition of "borrowing" in his Rules and Regulations. There are no outward signs of such a crisis, and no indication that lax enforcement of existing Rules and Regulations by the Federal Reserve Board or the Comptroller of the Currency will produce a wave of bank failures.

CONCLUSION

This Court sets its own standards for granting extraordinary deviation from normal appellate practice. Since Rule 18 means what it so emphatically says, Petitioner must give the Circuit Court of Appeals the first opportunity to affirm or reverse the decision below.

Respectfully submitted,

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